

Remarks

Claims 1, 5, 6 and 10-16 remain in this application. Claims 2-4, 7-9, and 17-83 were previously canceled. Previously claim 1 stated that the acid beverage composition, comprised components (A), (B), and (C). Claim 1 is amended to state that the acid beverage composition consists essentially of components (A), (B), and (C).

Rejection Under 35 USC §102

Claims 1, 5, 6 and 10-16 are rejected under 35 USC §102(e) as being anticipated by Shen (US Patent Application No. US 2004/0258827).

While not conceding the propriety of the Office Action, Applicants point out that Shen is not available as prior art against the present application because it was not described in an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, as required under 35 USC §102(e). As evidence of the Shen non-availability, Applicants submit a Declaration under 37 C.F.R. §1.131. The effective filing date of Shen is its filing date of June 17, 2003.

The Declaration is enclosed herewith in quadruple as all four inventors executed their own copy.

The Declaration shows that the Applicants made the claimed invention before the Shen effective filing date of June 17, 2003. Therefore, Shen is not available as prior art against the present application and is not a valid basis for denying the patentability of the present claims. Reconsideration and withdrawal of this ground of rejection are respectfully requested.

Claims 1, 5, 6 and 10-16 are rejected under 35 USC §102(e) as being anticipated by Huang (US Patent No. 6,887,508).

Huang relates to a protein stabilizing agent for stabilizing a protein suspension in an aqueous acidic liquid such as a juice. The Huang protein stabilizing agent is comprised of a high methoxyl pectin and a propylene glycol alginate. However, the present invention, as amended, claims an acid beverage composition, consisting essentially of; components (A), (B), and (C), wherein the hydrated protein stabilizing agent (A) comprises high methoxyl pectin. Propylene glycol alginate is excluded from the present invention.

As stated in M.P.E.P. §2131, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The protein stabilizing agent of Huang is comprised of a high methoxyl pectin and a propylene glycol alginate. In present claim 1, as amended, the acid beverage composition consists essentially of; components (A), (B), and (C), wherein the hydrated protein stabilizing agent (A) comprises high methoxyl pectin. Huang fails to disclose each and every limitation of amended claim 1. As such, claims 1, 5, 6 and 10-16 are novel over Huang. Reconsideration and withdrawal of this ground of rejection is respectfully requested

Claims 1, 5, 6 and 10-16 are rejected under 35 USC §102(e) as being anticipated by Patel (US Patent No. 6,811,804).

Patel et al. is directed to a beverage containing a protein system providing from about 10% to about 30% of the total calories of the beverage, preferably from about 13% to about 25% of the total calories of the beverage; a carbohydrate system which provides from about 70% to about 90% of the total calories of the product, preferably from about 75% to about 87% of the total calories of the beverage; and a vitamin system in quantities sufficient to provide at least 10% of the RDI of one or more vitamins in a single serving.

The present invention does not employ a vitamin system. In present claim 1, as amended, the acid beverage composition consists essentially of; components (A), (B), and (C). A vitamin system is excluded from the present invention.

As stated in M.P.E.P. §2131, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. Patel et al. disclose a beverage that contains a vitamin system. In present claim 1, as amended, the acid beverage composition consists essentially of; components (A), (B), and (C). A vitamin system is excluded from the present invention. Patel et al. fail to disclose each and every limitation of amended claim 1. As such, claims 1, 5, 6 and 10-16 are novel over Patel et al. Reconsideration and withdrawal of this ground of rejection is respectfully requested.

Rejection Under 35 USC §103(a)

Claims 1, 5, 6, and 10-16 are rejected under 35 USC §103(a) as being unpatentable over Shen (US Patent Application No. 2004/0258827) or Huang taken together with either Hoer et al. or Payne et al.

While not conceding the propriety of the Office Action, Applicants point out that Shen is not available as prior art against the present application because it was not described in an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent, as required under 35 USC §102(e). As evidence of the Shen non-availability, Applicants submit a Declaration under 37 C.F.R. §1.131. The effective filing date of Shen is its filing date of June 17, 2003. The present application was filed on April 15, 2004.

The Declaration shows that the Applicants made the claimed invention before the Shen effective filing date of June 17, 2003. Therefore, Shen is not available as prior art against the present application and is not a valid basis for denying the patentability of the present claims.

Huang, discussed above, is not a viable reference because the Huang protein stabilizing agent is comprised of a high methoxyl pectin and a propylene glycol alginate. However, the present invention, as amended, claims an acid beverage composition, consisting essentially of; components (A), (B), and (C). The hydrated protein stabilizing agent (A) is a high methoxyl pectin. Propylene glycol alginate is excluded from the present invention.

Hoer et al. are cited for their teaching of drying soy milk protein by the use of enzymatic hydrolysis to obtain a product of excellent functionality. In the present claims, functionality is preserved without using an enzyme. In the present claims, as amended, the acid beverage composition consists essentially of; components (A), (B), and (C). As such, the present claims, as amended, exclude processes utilizing enzymes.

Payne et al. is directed to producing protein crumble. The object of Payne et al. is to eliminate the need for shipping a wet product with a consequential higher transportation cost. Dry isolated soy proteins are hydrated and the resulting hydrated soy protein isolate is chopped until a gel-like material is formed. In the present claims, as amended, an acid beverage composition consists essentially of; components (A), (B), and (C). Component (C) is a protein slurry. In the present claims, as amended, chopping of the protein slurry is excluded.

Combining Shen or Huang with either Hoer et al. or Payne et al. as urged in the Office Action does not render the present claims 1, 5, 6, and 10-16 as obvious. Each reference taken singularly is deficient over the present claims. Combining these references does not remove the deficiencies.

In order for the Office to show a *prima facie* case of obviousness, M.P.E.P. §2143 requires that the Office must meet three criteria: (1) the prior art reference must teach or suggest all of the claim limitations; (2) there must be some suggestion or motivation, either in the reference itself or in the knowledge generally available to one of ordinary skill in the art, to modify the reference, and (3) there must be some reasonable expectation of success. The Office has clearly failed to meet its burden under (1) and/or (2) above, since Shen is removed by virtue of the Declaration. Huang taken together with either Hoer et al. or Payne et al. fail to teach or suggest all of the claim limitations of Applicant's claim 1, as amended and further there is no motivation by one of ordinary skill in the art for combining Huang with either Hoer et al. or Payne et al. Reconsideration and withdrawal of this ground of rejection is respectfully requested.


For the foregoing reasons, it is submitted that the present claims are in condition for allowance. The foregoing remarks are believed to be a full and complete response to the outstanding office action. Therefore favorable reconsideration and allowance are respectfully requested. If for any reason the Examiner believes a telephone conference would expedite the prosecution of this application, it is respectfully requested that he call Applicant's representative at 314.982.2409.

If any additional fees are due in connection with the filing of this document, the Commissioner is authorized to charge those fees to our Deposit Account No. 50-0421.

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